

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR PROPOSED REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.5
Title 14, California Code of Regulations
Re: Animals of California Declared to Be Endangered or Threatened

- I. Date of Initial Statement of Reasons: February 3, 2010

- ## II. Dates and Locations of Scheduled Hearings:

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| (a) | Notice Hearing: | Date: | March 3, 2010 |
| | | Location: | Ontario, CA |
| (b) | Adoption Hearing: | Date: | May 5, 2010 |
| | | Location: | Stockton, CA |

- ### III. Description of Regulatory Action:

- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.5 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of animals designated as endangered or threatened in California. The Commission has the authority to add or remove species from the list if it finds, upon the receipt of sufficient scientific information, that the action is warranted.

Petition History: On February 13, 2004, the Department received from the Commission for evaluation, a petition seeking action to list the California tiger salamander under provisions of the California Endangered Species Act (CESA; Fish and Game Code Section 2050, *et seq.*). The petition originated from the Center for Biological Diversity, Environmental Defense Center, Defenders of Wildlife, Sierra Club Sonoma Group, Citizens for a Sustainable Cotati, VernalPools.org, Citizen's Committee to Complete the Refuges, Butte Environmental Center, and the Ohlone Audubon Society.

The Department prepared an evaluation report and found that the information in the petition was sufficient to indicate the petitioned action may be warranted. The Department recommended that the Commission accept the petition (report and recommendation transmittal memo from Director Broddrick to Executive Secretary Treanor, July 28, 2004). At the Commission meeting in Concord on October 22, 2004, the Commission

heard the Department's presentation about the petition evaluation report and recommendation, as well as public testimony. The Commission rejected candidacy and published its Notice of Findings in the California Regulatory Notice Register on December 24, 2004.

The petitioners submitted a legal challenge to the Commission's decision, and in a written opinion issued December 14, 2006, the Sacramento Superior Court overturned the Commission's rejection of the petition. The Court ordered the Commission to accept the petition, declare CTS a candidate species, and proceed with the listing process. On February 26, 2007, the Commission filed an appeal to the ruling. On September 2, 2008, the Third District of the California Court of Appeals stated that the petition, when considered with the Department's petition evaluation report and comments received, clearly afforded sufficient information to indicate that some listing action may be warranted. The Commission subsequently accepted the petition for consideration at its February 5, 2009 meeting in Sacramento, and declared the California tiger salamander a candidate species. On February 20, 2009, the Commission formally notified the public and the Department of the salamander's candidacy, thereby starting the Department's one year status review process.

Based on the status review, the Department recommended to the Commission that the California tiger salamander be listed as threatened under CESA.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 2070 and 2075.5, Fish and Game Code.

Reference: Sections 1755, 2055, 2062, 2067, 2070, 2074.6, 2075.5, 2077, 2080, 2081 and 2835 Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change: None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

Petition to list the California tiger salamander (Center for Biological Diversity, January 28, 2004). Report to the California Fish and Game Commission, "Evaluation of Petition: Request of the Center for Biological Diversity et al. to List the California tiger salamander (*Ambystoma californiense*) as Endangered" (Department of Fish and Game, July 28, 2004). Report to the California Fish and Game Commission, "A Status Review of the California tiger salamander (*Ambystoma californiense*)" (Department of Fish and Game, January 11, 2010).

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

The Commission received the Department's status evaluation at its February 3, 2010 meeting and will hear public testimony at its March 3, 2010 meeting. Comments on the proposed listing were received by the Department in response to its request for public information. These comments are included in the status review report referenced above under section III (d).

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

No alternatives were identified.

(b) No Change Alternative:

If the Commission determines that listing is not warranted, the California tiger salamander will have no formal State legal status, the position it held prior to the petition filing.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; there, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

Although (CESA) statutes do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should

not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing or delisting process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically section 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact of businesses and private persons, it also contains an subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on business and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of the California tiger salamander as threatened will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department.

Threatened status is not expected to result in any significant

adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to the California Environmental Quality Act (CEQA). The CEQA requires local governments and private applicants undertaking projects subject to the CEQA to consider *de facto* endangered species to be subject to the same requirements under the CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). California tiger salamander has qualified for protection under the CEQA Guidelines Section 15380 since its designation by the Department in 1994 as a species of special concern and the US Fish and Wildlife Service in 2004 as threatened throughout its range.

Required mitigation as a result of lead agency actions under the CEQA, whether or not the species is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchasing off-site habitat, development and implementation of management plans, establishing new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. Lead agencies may also require additional actions should the mitigation measures fail, resulting in added expenditures by the proponent. If the mitigation measures required by the CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by the CEQA.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

- (c) Cost Impacts on a Representative Private Person or Business:

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or entities undertaking activities subject to CEQA. CEQA presently requires private applicants undertaking projects subject to CEQA to consider *de facto* endangered

(or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380).

Any added costs should be more than offset by savings that would be realized through the information consultation process available to private applicants under CESA. The process would allow conflicts to be resolved at an early stage in project planning and development, thereby avoiding conflicts later in the CEQA review process, which would be more costly and difficult to resolve.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game recommends that the Commission amend subsection (b)(3) of Section 670.5 of Title 14, CCR, to add the California tiger salamander (*Ambystoma californiense*) to the list of threatened animals.

In making the recommendation to list the California tiger salamander pursuant to CESA, the Department identified the following primary threats: 1) continued and long-term habitat loss/conversion and fragmentation (the California tiger salamander requires both aquatic and upland habitats; anything that impedes movements such as roads or other barriers restricts the salamander from moving between the two habitats); 2) hybridization with introduced non-native tiger salamanders over the past 60 years, resulting in decreased population and distribution of genetically “pure” native tiger salamanders; 3) increased predation by, and competition with, other non-native species - particularly fishes and amphibians. More detail about the current status of the California tiger salamander can be found in the “Report to the California Fish and Game Commission, “A Status Review of the California tiger salamander (*Ambystoma californiense*)” (Department of Fish and Game, January 11, 2010; <http://www.dfg.ca.gov/wildlife/nongame/publications/>)